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In the Supreme Court of the United States

OCTOBER TERM, 1992

STEPHEN R. STEINBRINK, ACTING COMPTROLLER OF THE CURRENCY, ET AL., PETITIONERS

v.

AMERICAN LAND TITLE ASSOCIATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether 12 U.S.C. 92—which provides that "in addition to" their other powers national banks located in places with 5,000 or fewer inhabitants may act as the agent for "any fire, life, or other insurance company"—impliedly bars national banks in more populous places from selling forms of insurance, such as title insurance, that the Comptroller of the Currency has determined are "incidental" to the "business of banking" under 12 U.S.C. 24 Seventh.

PARTIES TO THE PROCEEDINGS

The petitioners are Stephen R. Steinbrink, Acting Comptroller of the Currency (substituted as a party pursuant to Rule 35.3) and the Office of the Comptroller of the Currency. The respondents are the American Land Title Association and the New York State Land Title Association. By virtue of Rule 12.4, the Chase Manhattan Bank, N.A. (Chase), an intervenor-defendant below, is also a party in this Court. On September 17, 1992, Chase filed a petition for a writ of certiorari seeking review of the Second Circuit's judgment in this case. See *The Chase Manhattan Bank, N.A.* v. *American Land Title Ass'n*, No. 92-482.

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v.

AMERICAN LAND TITLE ASSOCIATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Acting Comptroller of the Currency and the Office of the Comptroller of the Currency, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 968 F.2d 150. The opinion of the district court (App., *infra*, 19a-30a) is reported at 772 F. Supp. 1353. The Comptroller's approval letter (App., *infra*, 31a-34a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1992. On September 4, 1992, Justice Thomas extended the time for filing a petition for a

writ of certiorari to and including October 13, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

12 U.S.C. 21 provides, in pertinent part:

> Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—
>
> * * * * *
>
> Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking.

12 U.S.C. 371(a) (as amended by Act of Dec. 19, 1991, Pub. L. No. 102-242, § 304(b), 105 Stat. 2354) provides:

> Any national banking association may make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to section 1828(*o*) of this title and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order.

12 U.S.C. 92 (Act of Sept. 7, 1916, ch. 461, 39 Stat. 753, as amended by Act of Oct. 15, 1982, Pub. L. No. 97-320, § 403(b), 96 Stat. 1511) provides, in pertinent part:

> That in addition to the powers now vested by law in national banking associations organized

> under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may receive for services so rendered such fees or commissions as may be agreed upon between the said association and the insurance company for which it may act as agent.

STATEMENT

1. Petitioners, the Acting Comptroller of the Currency and the Office of the Comptroller of the Currency, are the primary regulators of the nation's federally chartered banks. See generally 12 U.S.C. 1-15. Among other things, Congress has authorized national banks to "make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to * * * such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order." 12 U.S.C. 371(a) (as amended by Act of Dec. 19, 1991, Pub. L. No. 102-242, § 304(b), 105 Stat. 2354). Congress has also provided, in 12 U.S.C. 24 Seventh, that national banks may exercise "all such incidental powers as shall be necessary to carry on the business of banking."

Under the applicable regulations, national banks may employ operating subsidiaries to engage in activities "which are a part of or incidental to the business of banking." 12 C.F.R. 5.34(e). Before a national bank may establish an operating subsidiary to engage in new activities, however, the bank must submit a written notification to the Comptroller, who reviews the bank's proposal to determine "if the proposed activities exceed those legally permissible for a national bank's operating subsidiary." 12 C.F.R. 5.34(d)(1)(iii).

On June 20, 1989, the Comptroller approved a proposal by The Chase Manhattan Bank, N.A., a national bank headquartered in New York City, to establish two operating subsidiaries to sell title insurance as agent in connection with real estate loans made by Chase and its affiliates. App., *infra*, 31a-34a. Title insurance reduces the risk of loss resulting from title defects or encumbrances existing on property at the time the policy is issued. 7 R. Powell, *Powell on Real Property* ¶¶ 1028-1029 (P. Rohan ed. 1990). See also *FTC* v. *Ticor Title Ins. Co.*, 112 S. Ct. 2169, 2173 (1992). It can be issued both to owners of property and to lenders. *Powell on Real Property*, *supra*, at ¶ 1028. An owner's policy protects the ownership interest or right of possession in the property and is typically issued in an amount equal to the purchase price. *Id.* at ¶ 1033. A lender's policy protects the lender's security interest in the land securing the repayment of the mortgage and generally covers only the amount of the indebtedness outstanding. *Id.* at ¶ 1032.

In approving Chase's proposal, the Comptroller pointed out that the Office previously had concluded,

in Interpretive Letter 368, that national banks are authorized to sell title insurance. App., *infra*, 33a (citing Comptroller Interpretive Ltr. No. 368 (July 11, 1986), *reprinted in* [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,538 (July 11, 1986) (Letter 368), *reprinted in* App., *infra*, 35a-45a). As the Comptroller explained, the conclusion in Letter 368 was based on the determination that selling title insurance "is incidental to national banks' explicit authority to make, arrange, buy and sell mortgage loans under 12 U.S.C. §§ 24(7) and 371." App., *infra*, 33a. Indeed, the title insurance industry originated in connection with bank mortgage lending activities, and until the 1930s "many title insurance companies were departments of banks and trust companies." *Ibid.*

In Letter 368, the Comptroller also relied on *Independent Bankers Ass'n of America* v. *Heimann*, 613 F.2d 1164 (D.C. Cir. 1979), cert. denied, 449 U.S. 823 (1980), in which the court held that national banks may sell credit life insurance. App., *infra*, 42a-43a. In the approval letter in this case, the Comptroller noted the "judicial recognition" in *Heimann* that selling "forms of limited purpose insurance related to the traditional lending activities of banks" is an activity that is incidental to banking. *Id.* at 33a. The Comptroller found that Chase's proposal was "consistent in all material respects" with the proposal approved by the prior interpretive letter.[1] *Id.* at 34a.

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[1] The Comptroller observed that Chase and its affiliates would not require borrowers to use the Chase title insurance agency subsidiaries, nor would Chase and its affiliates grant or deny mortgages (or modify mortgage terms) because a borrower did or did not purchase title insurance through one

2. Respondents—the national association of title insurance companies and agents and its New York State counterpart—brought suit in the United States District Court for the Southern District of New York challenging the Comptroller's decision. In arguing that Chase may not sell title insurance, the title insurance associations argued, among other things, that 12 U.S.C. 92 impliedly bars the sale of title insurance by a bank in New York City. Section 92 provides that, "in addition to" the other powers vested in national banks, a national bank "located and doing business" in any place "the population of which does not exceed five thousand inhabitants" may "act as the agent for any fire, life, or other insurance company." [2]

The district court rejected the arguments of the title insurance associations and upheld the Comptroller's approval of Chase's application. Noting that "[t]itle insurance is commonplace where loans collateralized by a parcel of real property are made and has, in effect, become an essential element of the real estate package," the court found that "it is a rational conclusion that the sale of title insurance in connection with real estate loans made by a national bank is incidental to the express power of a

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of the subsidiaries. The Comptroller also noted that customers would be advised of the relationship between the title insurance agency subsidiaries and Chase. App., *infra*, 32a-33a.

[2] In their district court papers—and again before the court of appeals—the title insurance associations emphasized that although the text of Section 92 does not appear in the current edition of the United States Code, "[b]oth the Comptroller and the courts have recognized that the provision * * * remains in force." Mem. in Support of Pltf. Mot. for Summary Judgment 7 n.6; Pltf. C.A. Br. 8 n.5.

national bank to make real estate loans" under Section 24 Seventh. App., *infra*, 29a. The court further found that "it is rational to conclude that title insurance, like credit life insurance [the form of insurance at issue in *Heimann*], is an activity considered incidental to the business of banking in that it is a limited type of coverage that protects the lender in the event of a default." *Ibid.*

The district court also concluded that 12 U.S.C. 92 did not impliedly limit the incidental banking powers granted by 12 U.S.C. 24 Seventh. The court determined that it was neither "arbitrary nor capricious to view 12 U.S.C. § 92 as a supplemental powers provision, not a limitation on national banks' incidental powers." App., *infra*, 29a-30a. The court also held that even if Section 92 constituted such a limitation, the Comptroller had rationally determined that title insurance "is so significantly different from the broad forms of insurance addressed in § 92 as to remove title insurance from the scope of § 92." App., *infra*, 30a.

3. The court of appeals reversed. The court first considered whether Section 92 remains in existence, since the D.C. Circuit had held, in *Independent Ins. Agents of America, Inc.* v. *Clarke*, 955 F.2d 731, 739 (1992), petitions for cert. pending, Nos. 92-484 & 92-507, that Section 92 was repealed in 1918. "Contrary to the view of the D.C. Circuit," the Second Circuit concluded in this case, "section 92 remains valid law." App., *infra*, 6a, 11a.

The court acknowledged that Section 92 "obviously provides no explicit limitation on national bank activity." App., *infra*, 13a. Indeed, Section 92 provides that "in addition to" the other powers vested in national banks, banks in small towns may "act as the agent for any fire, life, or other insurance company."

Nevertheless, the court concluded, contrary to the Comptroller's determination, that Section 92 impliedly prohibits "national banks located and doing business in towns with *over* 5,000 inhabitants from engaging in the insurance agency business," including the sale of title insurance. App., *infra*, 13a. The court came to that determination chiefly by relying on the maxim "*expressio unius est exclusio alterius*." *Ibid.* In the court's view, "had Congress intended to grant national banks located in towns with large populations the authority to sell insurance, it would never have limited the grant of authority in section 92 to national banks in locations with under 5,000 inhabitants." *Ibid.*

The court recognized that the D.C. Circuit had "followed a different approach to interpreting section 92" in *Heimann*. App., *infra*, 16a. But the court in this case refused "to depart from [its] view of section 92." *Ibid.* It first suggested that the *Heimann* decision was based "largely on the nature of credit life insurance." *Ibid.* The court then held that by authorizing national banks to act "as the agent for *any* fire, life or *other* insurance company," Section 92 "makes inescapable the conclusion that Congress intended this provision to apply to 'any . . . insurance company.'" *Ibid.* Since, the court observed, "a title insurance company surely is an insurance company * * *, section 92 impliedly bars national banks from engaging in the title insurance agency business." *Ibid.*

Because the court viewed Section 92 as a limitation on national bank authority, it saw "no need to determine the scope of section 24 (Seventh)," the provision authorizing national banks to engage in activities "incidental" to the "business of banking." App., *infra*, 18a. "[E]ven if the general grant of power contained

in section 24 (Seventh) were sufficiently broad to encompass the title insurance agency business," the court stated, "the statute would have to yield to the specific limits on insurance activity contained in section 92." *Ibid.*

REASONS FOR GRANTING THE PETITION

The decision below presents a double conflict. First, the court's holding that 12 U.S.C. 92 was not repealed in 1918 conflicts with the D.C. Circuit's decision in *Independent Ins. Agents of America, Inc.* v. *Clarke*, 955 F.2d 731 (1992). We have asked the Court to review the D.C. Circuit's erroneous holding that Section 92 was repealed. *Steinbrink* v. *Independent Ins. Agents of America, Inc.*, No. 92-507.

Second, the court's holding in this case that Section 92 impliedly bars national banks in places with more than 5,000 inhabitants from selling forms of insurance that are incidental to the business of banking conflicts with the D.C. Circuit's decision in *Independent Bankers Ass'n of America* v. *Heimann*, 613 F.2d 1164 (1979), cert. denied, 449 U.S. 823 (1980). This second holding is plainly erroneous—Section 92 grants an *additional* power to banks in small towns, the power to engage in a general insurance agency practice. Section 92 does not prohibit, either expressly or impliedly, national banks in larger places from selling specialized forms of insurance, such as title insurance and credit life insurance, that are "incidental" to the "business of banking" and hence are permitted by 12 U.S.C. 24 Seventh. Review of this second holding is warranted because of the conflict, because the decision below is wrong, and because the decision below calls into question a variety of activities performed by national banks.

A. As the court of appeals appeared to recognize (App., *infra*, 16a), its conclusion that Section 92 "impliedly bars national banks in towns with more than 5,000 inhabitants from engaging in insurance agency activities" (App., *infra*, 16a) conflicts with the D.C. Circuit's decision in *Heimann*. In *Heimann*, the D.C. Circuit refused to adopt the argument that Section 92 "carries a clear implication" that national banks in large towns may not sell credit life insurance. 613 F.2d at 1170. Instead, as that court noted, "[b]y its own terms, the statute does not address the authority of national banks in larger towns or cities to act as agents for life insurance companies." *Id.* at 1170 n.18.

The court of appeals' determination in this case that Section 92's supposed limitation applies to "any . . . insurance company" (App., *infra*, 16a) cannot be reconciled with the holding in *Heimann*. The court of appeals concluded in this case that title insurance agency activities fall within the prohibition it inferred from Section 92 because "a title insurance company * * * is an insurance company." App., *infra*, 16a. So is a credit life insurance company. Thus, under the court's analysis, national banks located in towns of more than 5,000 population should be barred from selling credit life insurance, the activity that *Heimann* holds that they are empowered to perform. See also *American Ins. Ass'n* v. *Clarke*, 865 F.2d 278 (D.C. Cir. 1988) (holding that national banks can offer municipal bond insurance in the form of standby letters of credit). To be sure, the court of appeals stated that credit life insurance "is unique" because "it protects only the lender's interest by insuring that his loan will be repaid even if the borrower dies," while title insurance "insures the bor-

rower's equity in the property as well as the bank's interest in the mortgage it holds." App., *infra*, 17a. However, under the court's interpretation of Section 92, its asserted distinction is irrelevant, since whatever their differences, both title insurance and credit life insurance are forms of insurance.

Nor is the conflict among the courts of appeals lessened by the fact that the D.C. Circuit, in *Independent Ins. Agents*, has now concluded that Section 92 was repealed in 1918. Indeed, if anything, the D.C. Circuit's conclusion that Section 92 was repealed heightens the current confusion among the courts of appeals, for if Section 92 no longer exists, it does not place a limit on national bank activities.[6]

B. The court of appeals' determination that Section 92 prohibits a national bank from engaging in the sale of title insurance, unless the bank is located in a place with 5,000 or fewer inhabitants, is also in error.

1. As the D.C. Circuit recognized in *Heimann*, "[b]y its own terms" Section 92 "does not address the authority of national banks in larger towns or

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[6] The conflict among the circuits on the question of whether Section 92 constitutes a limitation on national bank powers is underscored by the court of appeals' reliance on the Fifth Circuit's decision in *Saxon* v. *Georgia Ass'n of Indep. Ins. Agents, Inc.*, 399 F.2d 1010 (1968), which employed a restrictive reading of Section 92 in concluding that national banks located in places with a population of more than 5,000 persons could not sell "broad forms of automobile, home, casualty and liability insurance." 399 F.2d at 1012. The D.C. Circuit in *Heimann* refused to follow the *Saxon* decision (see 613 F.2d at 1170), and the Eighth Circuit has stated—albeit in dicta—that "[t]here is a strong argument that *Saxon* was wrongly decided." *Independent Ins. Agents of America, Inc.* v. *Board of Governors*, 736 F.2d 468, 477 n.6 (1984).

cities to act as agents for life insurance companies." 613 F.2d at 1170 n.18. Indeed, the language of Section 92 belies any inference that it constitutes a limitation on national bank activities. Section 92 provides that "*in addition to* the powers now vested by law in national banking associations," national banks in places with 5,000 or fewer inhabitants "may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life or other insurance company" (emphasis added). The use of the introductory phrase "in addition to" shows that Section 92 is a grant of additional powers to national banks, and does not preclude insurance agency activities, such as the sale of title insurance, that fall within other statutory grants, including the general authority under Section 24 Seventh to "exercise * * * all such incidental powers as shall be necessary to carry on the business of banking."

Although the clarity of Section 92's language on this point obviates any need to resort to the statute's legislative history, that history also shows that Congress was aware that Section 92 constituted an additional grant of national bank powers, and was not a limitation on national bank activities. For example, Senator Owen, Section 92's sponsor, described the provision as "giving some additional powers to the small banks to act as agents in insurance matters." 53 Cong. Rec. 11,002 (1916). See *id.* at 11,001 (letter from the Comptroller explaining that the proposal resulted from consideration of "how the powers of these small national banks might be enlarged"). See also *Independent Ins. Agents of America, Inc. v. Board of Governors*, 736 F.2d 468, 477 n.6 (8th Cir. 1984) ("Congress was concerned only with providing

small-town banks with an additional profit source, not with prohibiting city banks from selling insurance").

The court below inferred a limitation on national bank activities by relying on the maxim "*expressio unius est exclusio alterius*." App., *infra*, 13a. That maxim, however, "is only an aid in the ascertainment of the meaning of the law," and "must yield whenever a contrary intention on the part of the law-maker is apparent." *Springer* v. *Philippine Islands*, 277 U.S. 189, 206 (1928). The maxim "can never override clear and contrary evidence of Congressional intent." *Neuberger* v. *Commissioner*, 311 U.S. 83, 88 (1940). In this case, the language of Section 92 forecloses the conclusion that Congress, by authorizing national banks in places with 5,000 or fewer inhabitants to engage in a general insurance agency business, intended to bar national banks in large towns and cities from exercising other powers.

2. Section 92 also applies only to the activities of national banks acting as the "agent for any fire, life, or other insurance company." Under the principle of *ejusdem generis*—a maxim of construction overlooked by the court below—a general term in a statutory list "should be understood in light of the specific terms that surround it." *Hughey* v. *United States*, 495 U.S. 411, 419 (1990); 2A N. Singer, *Sutherland Statutory Construction* § 47.17 (5th ed. 1992). Applying this principle, any limitation imposed by Section 92 extends only to the sale of broad forms of insurance, such as fire and life insurance, which are specifically enumerated in the provision, and does not encompass more specialized forms of insurance, such as title insurance, which are incidental to banking.[4] Indeed,

[4] In *Arcadia, Ohio* v. *Ohio Power Co.*, 111 S. Ct. 415, 419 (1990), the Court noted that application of *ejusdem generis*

application of *ejusdem generis* is necessary to give independent meaning to Congress's specification of "fire" and "life" insurance in Section 92. Under the court of appeals' reading of the statute, those terms are entirely unnecessary, since all types of insurance, including fire and life insurance, are encompassed in the phrase "any . . . insurance company." App., *infra*, 16a.[5]

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is not useful when the "categories of enumeration are so disparate." In this case, in contrast to the statute at issue in *Arcadia*, the categories of enumeration—fire and life insurance—are not disparate, but instead include broad forms of insurance that protect against future unknown risks. Title insurance, in contrast, protects against incomplete or erroneous information about property rights that are fixed at the time the contract is written (such as undetected title defects or encumbrances). *Powell on Real Property*, *supra*, ¶ 1029, at 92-7. For that reason, title insurance is considered a "distinct type of coverage that does not fall within any of the three basic classes of insurance [fire and marine, life and accident, and casualty]." R. Keeton & A. Widiss, *Insurance Law* § 1.5(e), at 27 (1988); accord *Powell on Real Property*, *supra*, ¶ 1029, at 92-7. Accordingly, title insurance is not an "other" form of insurance under Section 92.

[5] It would also be strange to conclude that, in enacting Section 92, Congress foreclosed sales of *title* insurance by banks in large towns, and did so without any discussion, since many banks provided title insurance directly in 1916, when Section 92 was enacted. See, *e.g.*, *Public Regulation of Title Insurance Companies and Abstracters* 14 n.2 (E. Roberts ed. 1961) (noting that in the half century following the establishment of the city's first title insurance company in 1876, "practically every bank and trust company in Philadelphia had its affiliated title department which examined and insured or guaranteed the titles in real estate acquired with the bank's own funds or for the account of its trust estates or its customers").

The Comptroller's reading of the National Bank Act does not render Section 92 "superfluous," as the court of appeals suggested. App., *infra*, 13a. No party has argued that the power of national banks to engage in insurance agency activities incidental to the business of banking under Section 24 Seventh authorizes banks to engage in an unlimited insurance agency business. It was this additional authority—to sell broad forms of insurance products that are not necessarily incidental to the business of banking—that Section 92 gave to national banks in small towns.

The court of appeals also relied on documents written by the Comptroller of the Currency and the counsel to the Federal Reserve Board prior to Section 92's passage to support its conclusion that Congress believed that national banks had no authority to act as insurance agents before Section 92 was enacted. App., *infra*, 14a-15a. See 53 Cong. Rec. 11,001 (1916) (letter from Comptroller Williams to Senator Owen); Right of a National Bank to Write Insurance Through its Officers, 2 Fed. Res. Bull. 73, 74 (1916) (letter from Board Counsel Elliott to Board Governor Hamlin). However, both documents refer to broad forms of insurance. See 53 Cong. Rec. 11,001 (1916) (referring to "fire, life, etc." insurance); 2 Fed. Res. Bull. at 73 (analyzing the power of national banks to write "fire, cyclone, liability and other kinds of insurance"). Neither suggests that more specialized forms of insurance agency activities, more closely connected to banking, would not fall within the incidental powers of national banks. In any event, this backdrop to the enactment of Section 92 at most would show what Congress in 1916 believed was authorized by Section 24 Seventh, which had been passed more than fifty years before.

3. Finally, as the court of appeals acknowledged, the Comptroller's interpretation of "a statute that [he] is charged with enforcing is entitled to deference in accordance with *Chevron*." App., *infra*, 11a. See also *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 403-404 (1987). In this case, the Comptroller's interpretation of Section 92 as a supplemental powers provision inapplicable to the sale of specialized forms of insurance is firmly grounded in the language and history of the statute. That should have been the end of the matter.

C. Like the conflict over the question of Section 92's existence, the conflict between the Second and the D.C. Circuits over the effect of Section 92 is of sufficient importance to warrant resolution by this Court.

Initially, whether national banks located in places with a population of more than 5,000 persons may sell title insurance is, by itself, an issue of substantial importance to national banks. Title insurance is a billion-dollar industry. See *FTC* v. *Ticor Title Ins. Co.*, 112 S. Ct. 2169, 2173 (1992) (noting that the title insurance industry earned $1.35 billion in gross revenues in 1982). As the district court found, "every loan made by a bank that is collateralized by a parcel of real estate is conditioned on an examination of the relevant land records," and lenders regard a "title policy as an essential part of their loan package." App., *infra*, 24a. In this case, according to respondents, Chase and its affiliates originated more than $5 billion in residential real estate loans in the United States in 1988 and held more than $17 billion of real estate loans in their portfolios at the end of that year. Compl. ¶ 11, J.A. 14. The court of appeals' ruling forecloses national banks in large towns from

offering their many real estate borrowers the option of obtaining title insurance from their lender.

Apart from title insurance, the court of appeals' ruling calls into question the ability of national banks to sell a host of other products they have long offered to their customers. At the present time, the Comptroller permits national banks, wherever located, to sell a number of insurance products under their incidental banking powers. These include credit life insurance,[6] credit disability insurance,[7] and municipal bond insurance,[8] as well as mortgage life and disability insurance, involuntary unemployment insurance, and vendors single interest insurance (which protects a lender in case of loss or damage to personal property in which the lender has a security interest).[9] In addition, national banks are currently authorized to provide debt cancellation contracts,[10] as well as

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[6] See 12 C.F.R. 2.6; *Independent Bankers Ass'n of America* v. *Heimann*, 613 F.2d 1164 (D.C. Cir. 1979), cert. denied, 449 U.S. 823 (1980).

[7] Comptroller Interpretive Ltr. No. 283 (Mar. 16, 1984), *reprinted in* [1983-1984 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,447 (Mar. 16, 1984); Comptroller Interpretive Ltr. No. 495 (Dec. 22, 1989), *reprinted in* [1989-1990 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,084 (Dec. 22, 1989).

[8] Comptroller Interpretive Ltr. No. 338 (May 2, 1985), *reprinted in* [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,508 (May 2, 1985); *American Ins. Ass'n* v. *Clarke*, 865 F.2d 278 (D.C. Cir. 1988).

[9] See, *e.g.*, Comptroller Interpretive Ltr. No. 283 (Mar. 16, 1984), *reprinted in* [1983-1984 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,447 (Mar. 16, 1984).

[10] See 12 C.F.R. 7.7495; *First Nat'l Bank* v. *Taylor*, 907 F.2d 775 (8th Cir. 1990).

variable[11] and fixed annuities,[12] products which the insurance industry has attempted to characterize as insurance. Under the court of appeals' analysis, these products—at least insofar as they constitute "insurance"— may no longer be sold by national banks in places with more than 5,000 inhabitants.

D. In our view, the Court should grant both our petition in this case and our petition challenging the D.C. Circuit's decision in *Independent Ins. Agents of America, Inc.* v. *Clarke*. Because this case is related to the D.C. Circuit case and because the court below was clearly wrong in holding that Section 92 bars national banks from selling title insurance, we believe that it makes sense to consolidate the two cases. In that manner, the current confusion in the circuits may be resolved by one decision of this Court holding that Section 92 exists, but does not impliedly bar national banks from selling forms of insurance that are incidental to the business of banking.[13]

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[11] Comptroller Interpretive Ltr. No. 331 (Apr. 4, 1985), *reprinted in* [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,501 (Apr. 4, 1985).

[12] Comptroller Interpretive Ltr. No. 499 (Feb. 12, 1990), *reprinted in* [1989-1990 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,090 (Feb. 12, 1990); *Variable Annuity Life Ins. Co.* v. *Clarke*, 786 F. Supp. 639 (S.D. Tex. 1991), appeal pending, No. 92-2010 (5th Cir.) (set for argument the week of Nov. 30, 1992).

[13] The Court should grant the petition in this case rather than holding it for the case arising from the D.C. Circuit because a holding that Section 92 is good law would not resolve the important question presented by this petition. If the Court subsequently should conclude, contrary to our submission in the D.C. Circuit case, that Section 92 has been repealed, the Court may want to vacate the Second Circuit's judgment and

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1992

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remand the case because the court's holding that Chase may not sell title insurance was grounded in its holding that Section 92 exists. At the same time, the Court should not hold the D.C. Circuit case while this case is pending because it is not necessary to decide whether Section 92 was repealed in order to reverse the Second Circuit's judgment in this case. In our view, the Second Circuit erred by holding that banks in large towns may not sell title insurance whether or not Section 92 is good law.

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 720, Docket 91-6235

AMERICAN LAND TITLE ASSOCIATION,
NEW YORK STATE LAND TITLE ASSOCIATION,
PLAINTIFF-APPELLANT

v.

ROBERT L. CLARKE, in his official capacity as Comptroller of the Currency, Office of the Comptroller of the Currency, an agency of the United States,
DEFENDANT-APPELLEE

THE CHASE MANHATTAN BANK, N.A.,
INTERVENOR-DEFENDANT-APPELLEE

Argued and Submitted Jan. 7, 1992

Decided June 15, 1992

Before OAKES, Chief Judge MESKILL and PRATT, Circuit Judges.

OAKES, Chief Judge:

This issue in this appeal is whether two provisions of the National Bank Act, 12 U.S.C. §§ 92 and 24 (Seventh) (1988), permit national banks to engage in the title insurance agency business.

I.

Appellants the American Land Title Association and the New York State Land Title Association (collectively ALTA), brought suit in the United States District Court for the Southern District of New York against appellees Robert L. Clarke, in his official capacity as Comptroller of the Currency, and the Office of the Comptroller of the Currency (collectively OCC), seeking declaratory and injunctive relief that would, *inter alia*, void a June 1989 OCC decision permitting The Chase Manhattan Bank, N.A. (Chase Manhattan) to engage in the title insurance agency business, and would direct the OCC to refrain from authorizing any other national bank from engaging in this business. Chase Manhattan subsequently intervened as a party defendant (OCC and Chase Manhattan are collectively referred to as OCC).

The OCC rendered the decision at issue in its role as regulator of national banks and administrator of national banking laws. The decision authorized Chase Manhattan to proceed with its proposal to establish two operating subsidiaries designed to sell title insurance, as agents, to borrowers and lenders in connection with real estate loans made by the bank and its affiliates. The proposal further provided that borrowers would not be obligated to buy title insurance through the subsidiaries, and a borrower's failure to use the subsidiaries would not affect Chase Manhattan's other dealings with the borrower. The OCC

based its decision on an interpretive letter issued in 1986, OCC Staff Interpretive Letter No. 368, [1985-1987 Transfer Binder] Fed. Banking L.Rep. (CCH) ¶ 85,538, at 77,836 (July 11, 1986), that allowed a national bank to act as agent in the sale of title insurance.

Mary Johnson Lowe, *district judge*, denied ALTA's motion for summary judgment and granted the OCC's motion for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure. ALTA now appeals. For the reasons set forth below, we reverse.

II.

A. Validity of 12 U.S.C. § 92

We note at the outset the existence of some question, dating back at least to the 1950s, regarding the validity of 12 U.S.C. § 92. This question arose because in 1918, two years after section 92 was enacted, a revision and reenactment of section 5202 of the Revised Statutes of the United States omitted section 92. Neither the OCC nor ALTA are troubled by this issue. The Supreme Court, albeit in dicta, has mentioned that section 92 was omitted from the 1918 enactment but assumed it remained valid. *Commissioner v. First Sec. Bank of Utah*, 405 U.S. 394, 401 n. 12, 92 S.Ct. 1085, 1090 n. 12, 31 L.Ed.2d 318 (1972). Even Congress must have thought the provision valid because in Pub.L. No. 97-820, § 408(b), 96 Stat. 1469, 1511 (1982), it enacted an amendment to section 92 striking out some of its language. But the D.C. Circuit recently saw fit to add a new layer to this debate by declaring, *sua sponte*, that "section 92 has ceased to exist." *Independent Ins. Agents of Am. v. Clarke*, 955 F.2d 781, 789 (D.C.Cir. 1992).

Thus, we feel compelled to address this issue even though the parties neither briefed nor argued it.

Section 92 was enacted in 1916 as an amendment to section 13 of the Federal Reserve Act of 1913, Pub.L. No. 68-18, § 13, 38 Stat. 251, 263-64 (1913). Pub.L. No. 64-270, § 92, 89 Stat. 752, 753 (1916) The relevant portions provided as follows:

> Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows: "No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:
>
> "First. Notes of circulation.
>
> "Second. Moneys deposited with or collected by the association.
>
> "Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.
>
> "Fourth. Liabilities to the stockholders of the association for dividends and reserve profits.
>
> "Fifth. Liabilities incurred under the provisions of the Federal Reserve Act.
>
> . . . .
>
> "That in addition to the powers now vested by law in national banking associations . . . any such association located and doing business in any place the population of which does not exceed five thousand inhabitants . . . may . . . act as the agent for any fire, life, or other insurance company. . . ."

In 1918, Congress enacted the War Finance Corporation Act of 1918, Pub.L. No. 65-121, 40 Stat. 506 (1918). In Title I, Congress created the War Finance Corporation and detailed its structure and powers. The final section of Title I—section 20—provides, in its entirety:

> Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows:
>
> "*Sec. 5202.* No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:
>
> "First. Notes of circulation.
>
> "Second. Moneys deposited with or collected by the association.
>
> "Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.
>
> "Fourth. Liabilities to the stockholders of the association for dividends and reserve profits.
>
> "Fifth. Liabilities incurred under the provisions of the Federal Reserve Act.
>
> "*Sixth. Liabilities incurred under the provisions of the War Finance Corporation Act.*" (Emphasis added.)

The italicized portions indicate the additions to section 5202 effected by the War Finance Corporation Act. Obviously, Congress omitted the remaining provisions of section 5202 that, in the Act of 1916, had

followed immediately after the provision entitled "Fifth"—including the text of section 92.[1]

Contrary to the view of the D.C. Circuit, we believe that this omission was inadvertent and thus we do not interpret it as having effected a repeal of section 92. Congress did not expressly repeal section 92 when it enacted the War Finance Corporation Act. We recognize, however, that an amendment to a statute that omits certain provisions almost always reflects Congress' intent to repeal the omitted provisions. However, just as we do not blindly give effect to an express repeal of a statute, *see In re Adamo*, 619 F.2d 216, 222 (2d Cir.) (express repeal of statutory provision not given effect because to do so would enforce an obvious mistake and contravene both common sense and statutory purpose), *cert. denied*, 449 U.S. 843, 101 S.Ct. 125, 66 L.Ed.2d 52 (1980), we do not necessarily give effect to an omission. Indeed, "the rule that amendment 'to read as follows' repeals everything omitted" is only an "aid[] in the interpretation of statutes, not [a] syllogism[]. [It] must yield where [its] application would be inconsistent with the purposes of the statute." *FTC v. Standard Motor Products, Inc.*, 371 F.2d 613, 617 (2d Cir. 1967); *see also S.E.C. v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350-51 & n. 8, 64 S.Ct. 120, 123 & n. 8, 88 L.Ed. 88 (maxims of statutory construction are but aids to interpretation).

Thus, we next consider the purpose of the War Finance Corporation Act in general, and section 20 in particular. The text and its legislative history indicate that the purpose of the Act was to ensure that

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[1] Indeed, the omission is reflected in the United States Code, which labels 12 U.S.C. § 92 "[o]mitted."

sufficient capital flowed to industries deemed necessary to the prosecution of World War I. As stated by then Secretary of the Treasury, W.G. McAdoo, in a written statement presented before the Senate Committee on Finance and included in the Senate Report, S.Rep. No. 286, 65th Cong., 2d Sess. 4 (1918):

> The bill is purely a war measure designed to conserve the supply of labor and materials for the purposes of the war, and to help supply the war's financial requirements, and to give them a first claim on capital seeking investment in like manner as the war's material requirements have been given a first claim on production.

Congress sought to achieve this purpose by creating two institutional mechanisms: a War Finance Corporation and a Capital Issues Committee.[2] Among other things, the Act empowered the War Finance Corporation to make advances to banks who had loans outstanding to, or had purchased the bonds of, entities "whose operations shall be necessary or contributory to the prosecution of the war." War Finance Corporation Act of 1918, Pub.L. No. 65-121, § 7, 40 Stat. 506, 508 (1918). Thus, Congress intended the War Finance Corporation to serve as a conduit for channeling funds, generally via banks, to war industries.

That successful prosecution of the war was the sole purpose of the War Finance Corporation Act is underscored by the fact that it was a temporary measure. Section 1 provided that the Corporation's

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[2] The Capital Issues Committee, whose functions were set forth in Title II, was designed to regulate the sale of new issues of securities. War Finance Corporation Act of 1918, Pub.L. No. 65-121, § 203, 40 Stat. 506, 513 (1918).

powers would terminate (with the exception of powers incidental to its liquidation and winding up), and section 206 provided that Title II would continue in effect only until, six months after the end of the war, with such date to be fixed by the President. Thus, the entire enactment was drafted to be virtually self-destructing.

We next focus on the purpose of section 20 of the War Finance Corporation Act, and begin with its legislative history. Section 20 was offered on the floor of the House by Representative Michael F. Phelan of Massachusetts during consideration of the House version of the bill, H.R. 10608. 76 Cong.Rec. 3804 (1918). The only explanation of the amendment was offered by Representative Claude Kitchin, who stated:

> If we do not put in this provision, and make the change in the law which this amendment makes, it will tie the hands of the national banks from helping out these corporations.
>
> . . . .
>
> I think there were some of the committees that had this amendment under consideration and thought that this section of the Revised Statutes should not apply to this limitation.

Id. (statement of Rep. Kitchin). The amendment was agreed to without debate, and the House adopted its version of the bill.

The House bill and the Senate version, S. 3714, were then reconciled by a conference committee, which settled on a version that included section 20. The House conference report, S.R.Conf.Rep. No. 448, 65th Cong., 2d Sess. 19 (1918) (Statement of Managers), explained the effect of section 20 as follows:

> This section provides that section 5202 of the Revised Statutes of the United States relating to the indebtedness of a national banking association shall not apply in the case of any liability incurred by such association under the provisions of the War Finance Corporation act. This provision does not appear in the Senate Bill. The conferees adopt the House section.

When the Senate version of this conference report, S.Doc. No. 211, 65th Cong., 2d Sess. (1918), was submitted to the Senate by Senator Simmons, the Senator explained the significant amendments incorporated from the House version of the bill, but he did not address the addition of section 20. 76 Cong. Rec. 4376-79 (statements of Sen. Simmons). Ultimately, both the Senate and House agreed to enact the conferees' version of the bill.

No mention of the insurance powers of national banks exists in the legislative history. Thus, the legislative history indicates that the sole purpose of the revision was to ensure that section 5202 did not apply to liabilities incurred by a national bank in connection with the War Finance Corporation.

This view of the purpose of section 20 is supported by the text of the provision, which shows that the only substantive addition to the existing version of section 5202 was the following paragraph: "Sixth. Liabilities incurred under the provisions of the War Finance Corporation Act." In sum, it is obvious from a reading of both section 20 in its entirety, and its legislative history, that the amendment was designed to further the general purpose of the Act by ensuring that national banks could obtain funds from the War Finance Corporation without running afoul of the re-

quirement, contained in the opening paragraph of section 5202, that certain bank liabilities not exceed the capital requirements set forth in the section.

Given the purposes of the Act as a whole and section 20 in particular, we believe that Congress did not intend to alter the insurance agency powers of national banks when it enacted section 20. First, on a general level, it would be wholly incongruous for Congress to repeal a provision regarding the totally unrelated matter of insurance agency powers in an emergency measure directed at winning the war. Second, on a more specific level, it is highly unlikely that Congress' intent to render existing limits on national bank liabilities consistent with the operations of the War Finance Corporation would just happen to coincide with an intent to repeal provisions regarding national banks' insurance agency powers. Third, we cannot believe that Congress intended to make permanent changes to national banks' insurance agency powers in an act that by its terms would virtually self-destruct six months after the conclusion of the war. Fourth, if it actually was Congress' intent to effect such a permanent change to an unrelated area of law, we would expect some clue to this intent to appear somewhere in the legislative history, but we have searched it and it does not. Fifth, it would be—at last arguably—inconsistent for Congress to repeal a provision that, as we explain below, bars national banks in large towns from engaging in insurance agency activity when the primary purpose of Title I of the War Finance Corporation Act was to orient national bank activity towards financing war industries.

We also note that the structure of section 20 supports our view that section 92 was inadvertently

omitted. The omission occurs precisely after the insertion of the new paragraph entitled "Sixth"—the provision that rendered the War Finance Corporation Act consistent with existing national banking law. This gives rise to the inference that the drafters of section 20 forgot to include the remainder of section 5202 after they inserted the new paragraph.

For these reasons, we believe the only rational interpretation of the words "amended so as to read as follows" is that, contrary to the gneral rule, they do not effect a repeal of 12 U.S.C. § 92. Thus, section 92 remains valid law. We now turn to the issues raised by the parties.

B. Standard of Review

ALTA first questions the district court's application of the principles of deference to agency action set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45, 104 S.Ct. 2778, 2787-83, 31 L.Ed.2d 694 (1984), because the OCC's decision to permit Chase Manhattan to sell title insurance took the form of an interpretive ruling rather than a regulation, as was the case in *Chevron*. We disagree. An OCC ruling interpreting a statute that it is charged with enforcing is entitled to deference in accordance with *Chevron*. *See, e.g., Clarke v. Securities Indust. Ass'n*, 479 U.S. 388, 403-04, 107 S.Ct. 750, 759, 93 L.Ed.2d 757 (1987) (citing *Chevron* with approval and deferring to the Comptroller's interpretation of the National Bank Act, given that the provision in question was ambiguous and the Comptroller's interpretation was reasonable); *see also Securities Indust. Ass'n v. Clarke*, 885 F.2d 1034, 1042 (2d Cir. 1989) (acknowledging applicability of

principles of deferential review to Comptroller's decision), *cert. denied*, 493 U.S. 1070, 110 S.Ct. 1118, 107 L.Ed.2d 1021 (1990); *American Ins. Ass'n v. Clarke*, 865 F.2d 278, 280-81 (D.C.Cir. 1988). Thus, the test set forth in *Chevron* is fully applicable to the OCC decision at issue in this case.

Under *Chevron*, we must first decide "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842, 104 S.Ct. at 2781. If, however, the statute is "silent or ambiguous with respect to the specific issue," *id.* at 843, 104 S.Ct. at 2782, then we will uphold the OCC's interpretation provided it is reasonable and not "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844, 104 S.Ct. at 2782.

C. Section 92

ALTA argues that the district court erred in upholding the OCC's view that 12 U.S.C. § 92 places no limitation on national banks' incidental powers under 12 U.S.C. § 24 (Seventh). ALTA contends that section 92 impliedly prohibits national banks from selling insurance—including title insurance—in towns with more than 5,000 inhabitants.

To determine the scope of section 92, we turn first to the relevant statutory language:

> That in addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census may, under such rules and regulations as may be prescribed by the

> Comptroller of the Currency, act as the agent for any fire, life, or other insurance company. . . .

This provision obviously provides no explicit limitation on national bank activity. But the maxim of *expressio unius est exclusio alterius*, used as an aid to construction, leads to the conclusion that Congress intended to prohibit national banks located and doing business in towns with *over* 5,000 inhabitants from engaging in the insurance agency business. *See, e.g., Water Transp. Ass'n v. ICC.*, 722 F.2d 1025, 1029 (2d Cir. 1988). Applying this principle, had Congress intended to grant national banks located in towns with large populations the authority to sell insurance, it would never have limited the grant of authority in section 92 to national banks in locations with under 5,000 inhabitants. And if at the time of enactment Congress believed that all national banks—regardless of location—already possessed the authority to sell insurance, this provision would have been superfluous. Thus, we believe that the language of section 92 evinces Congress' intent to bar national banks that fall outside of the provision's geographical restrictions from acting as insurance agents.

This statutory construction, of course, would have to "yield to clear contrary evidence of legislative intent." *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458, 94 S.Ct. 690, 693, 38 L.Ed.2d 646 (1974). But here, the legislative history lends support to our view of the statute. Although the legislative history of section 92 is sparse, two documents in particular shed light on the backdrop to Congress' enactment of this legislation in September 1916. The first document, published by the Federal Reserve Board in February 1916, is a

letter from its counsel to the Governor of the Federal Reserve Board, opining that the insurance business did "not come within either the express or implied powers of national banks." 2 Fed.Res.Bull. 73, 74 (Feb. 1916). The letter concluded with the following statement: "Any such extension of the powers of national banks must be left to the consideration of Congress." *Id.*

The second document is a June 1916 letter from the then Comptroller of the Currency, John Skelton Williams, to the Senate Banking Committee, in which he proposed an amendment to the National Bank Act. 58 Cong.Rec. 11001 (1916). In the letter, the Comptroller explained that "[n]ational banks are not given either expressly nor by necessary implication the power to act as agents for insurance companies." *Id.* Enclosed with the letter was a draft of a proposed amendment "designed to empower national banks located in towns of not over 3,000 population . . . to act as agents for the placing of insurance policies." *Id.* The Comptroller explicitly stated that "from the standpoint of public policy and banking efficiency this authority should be limited to banks in small communities." *Id.* This letter was entered into the Congressional Record by the Chairman of the Senate Banking Committee, Sen. Robert L. Owen. *Id.* The Comptroller's amendment was ultimately enacted, albeit with the modification that national banks in towns with populations up to 5,000 could sell insurance. *Id.* at 11153.

These two documents indicate that when Congress enacted section 92, it did so in the belief that under existing banking law (specifically 12 U.S.C. § 24 (Seventh)) national banks had no authority to en-

gage in insurance agency activities. Furthermore, the Comptroller's letter provided evidence that Congress intended to withhold from national banks, located in towns with over 5,000 inhabitants, the authority to sell insurance. Accordingly, the legislative history supports our construction of the statute.

Our view of the statute derives further support from *Saxon v. Georgia Ass'n of Independent Ins. Agents*, 399 F.2d 1010 (5th Cir. 1968). In *Saxon*, the court relied on section 92 to declare unlawful Comptroller Saxon's ruling that permitted a national bank to sell its borrowers "broad forms of automobile, home, casualty and liability insurance." *Saxon*, 399 F.2d at 1012. The court applied the principle of *expressio unius est exclusio alterius*, and analyzed the legislative history to interpret section 92 such that "national banks have no power to act as insurance agents in cities of *over* 5,000 population." *Id.* at 1013.

The OCC contends that *Saxon* is irrelevant to the issue before us.[3] The OCC attempts to distinguish *Saxon* on the ground that it did not involve a form of insurance, like title insurance, that is essential to a bank's ability to provide financing. The *Saxon* court, however, did not rest its decision on the nature of the insurance activities engaged in by the bank. Instead, as we have stated, it simply viewed section 92 as an expression of Congress' intent that "national banks have no power to act as insurance agents in cities of *over* 5,000 population." *Id.* at 1013.

The OCC also urges us to disregard *Saxon* because the D.C. Circuit in *Independent Bankers Ass'n v.*

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[3] The OCC also contends that Saxon was wrongly decided. We disagree.

Heimann, 613 F.2d 1164 (D.C.Cir.1979), *cert. denied*, 449 U.S. 823, 101 S.Ct. 84, 66 L.Ed.2d 26 (1980), followed a different approach to interpreting section 92. The *Heimann* court held that section 92 did not bar a national bank from selling credit life insurance in a town with over 5,000 inhabitants. *Id.* at 1170. Although the court stated in a footnote that "[b]y its own terms, the statute does not address the authority of national banks in larger towns or cities to act as agents for life insurance companies", *Id.* at 1170 n.18, it seems to have based its decision largely on the nature of credit life insurance rather than on the issue of whether section 92 impliedly operates as a bar to certain national bank activity. Thus, we see no reason to depart from our view of section 92.

Having determined that section 92 impliedly bars national banks in towns with more than 5,000 inhabitants from engaging in insurance agency activities in general, we must now decide whether this prohibition applies to title insurance activities in particular. Section 92 applies to national banks that "act as the agent for *any* fire, life, or *other* insurance company." 12 U.S.C. § 92 (emphasis added). We believe that this language makes inescapable the conclusion that Congress intended this provision to apply to "any . . . insurance company," and a title insurance company surely is an insurance company. *Id.* Thus, section 92 impliedly bars national banks from engaging in the title insurance agency business.

The OCC again relies on *Heimann*, asserting that, like credit life insurance, title insurance activities are outside of section 92's limits on national bank activity. In upholding the OCC regulations at issue in *Heimann*, the court reasoned that "[u]nlike other

forms of insurance coverage . . . credit life insurance is a limited special type of coverage written to protect loans. In no way does it involve the operations of a general life insurance business." *Heimann*, 613 F.2d at 1170.

Heimann, however, does not persuade us that section 92 is inapplicable to a national bank's title insurance activities. First, as the *Heimann* court pointed out, credit life insurance is unique in that it protects only the lender's interest by insuring that his loan will be repaid even if the borrower dies. When a bank sells credit life insurance, it is similar to the bank demanding a higher price for the loan to compensate for its assumption of a risk inherent in any extension of credit made pursuant to a borrower's promise to pay—the risk that the borrower's death will render him personally incapable of repaying the loan. Title insurance, by contrast, insures the borrower's equity in the property as well as the bank's interest in the mortgage it holds. Second, *Heimann's* persuasiveness is further eroded by its scant analysis of section 92 and its failure to discuss the provision's legislative history. Thus, *Heimann* is not dispositive of section 92's bearing on a national bank's power to sell title insurance.

D. Section 24 (Seventh)

In addition to the express powers granted national banks by the National Bank Act, Section 24 (Seventh) of the Act grants them "all such incidental powers as shall be necessary to carry on the business of banking." The OCC contends that under judicial interpretations of this provision, a bank's sale of title insurance, as agent, is "incidental" to the banking

business within the meaning of section 24 (Seventh), and thus the OCC's decision is consistent with the National Bank Act.

Based on our interpretation of section 92, we see no need to determine the scope of section 24 (Seventh). We are guided by the principle that where two statutes conflict, the statute that addresses the matter under consideration in specific terms controls over one that does so in a general manner, unless of course Congress has mainifested a clear intent to the contrary. *See Crawford Fitting Co. v. J.T. Gibbons, Inc.* 482 U.S. 437, 445, 107 S.Ct. 2494, 2499, 96 L.Ed.2d 385 (1987). We discern no evidence that Congress intended section 24 (Seventh) to control section 92. Thus, even if the general grant of power contained in section 24 (Seventh) were sufficiently broad to encompass the title insurance agency business, so construed the statute would have to yield to the specific limits on insurance activity contained in section 92. For this reason, we do not decide whether the title insurance agency business is "incidental" to banking within the meaning of section 24 (Seventh).

III.

Because we find that section 92 prohibits national banks located and doing business in places with over 5,000 inhabitants from engaging in the title insurance agency business, we reverse the judgment of the district court and direct it to enter summary judgment for the appellants. To defer to the OCC in this case would flout Congressional intent—something we remain unwilling to do.

Reversed.

APPENDIX B

UNITED STATES DISTRICT COURT
S.D. NEW YORK

No. 89 CIV. 6939 (MJL)

AMERICAN LAND TITLE ASSOCIATION and NEW YORK STATE LAND TITLE ASSOCIATION, PLAINTIFFS

v.

ROBERT L. CLARKE, in his official capacity as Comptroller of the Currency, and the Office of the Comptroller of the Currency, an Agency of the United States, DEFENDANTS

and

THE CHASE MANHATTAN BANK, N.A.,
INTERVENOR-DEFENDANT

Aug. 7, 1991

OPINION AND ORDER

LOWE, District Judge.

Before this Court is plaintiffs' motion pursuant to Fed.R.Civ.P. 56 for summary judgment. Defendants cross-move for dismissal under Fed.R.Civ.P. 12(b)

(6). For the reasons set forth below, defendants' motion is granted and plaintiffs' motion is denied.

BACKGROUND

The OCC is the federal agency charged with the supervision and regulation of national banks and the administration of the National Bank Act of 1864 (the "NBA"). 12 U.S.C. §§ 1 et seq. National banks are permitted to engage in their authorized activities through operating subsidiaries, and the provisions of the Federal banking laws are applicable to those operating subsidiaries. 12 C.F.R. § 5.34(d)(1) requires a national bank to notify the Deputy Comptroller in the appropriate district when it proposes to perform new activities through such an operating subsidiary. The Deputy Comptroller must then review the proposal in order to determine whether or not the new activities are within the scope of a national bank's legally permissible activities. 12 C.F.R. § 5.34(d)ii.

Pursuant to the above rules, on March 3, 1989, Chase Manhattan, a national banking association subject to the NBA, notified the OCC that it intended to establish two operating subsidiaries to engage in the business of issuing title insurance. Chase Manhattan, through the subsidiaries, wished to sell title insurance, as agent, to owners and lenders in connection with residential and commercial real estate loans made by the bank and its affiliates.[1] Under Chase Manhattan's proposal, the subsidiaries would

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[1] Chase Manhattan requires customers to obtain title insurance as a condition to obtaining mortgage loans in order to protect the lender's security interest in the mortgaged property.

perform certain services, including reviewing title abstracts, obtaining updated abstract and title opinions, preparing preliminary and final title insurance commitments on behalf of insurers and providing clerical assistance incidental to the subsidiaries' activities.

The bank outlined the proposed procedures for issuing title insurance as follows:

1. there would be no obligation on the part of the borrowers to use the services of the subsidiaries;

2. the lender's decision to grant or deny a mortgage would not be affected by whether a borrower chose to purchase title insurance from the bank;

3. no preferential treatment would be accorded to customers who chose to obtain title insurance through the bank, and;

4. customers would be advised of the services offered by the subsidiaries and of the relationship between the lender and the subsidiaries.

The proposed plan would include procedures that would guarantee the subsidiaries' compliance with all federal and state laws and regulations applicable to title insurance activities.

By letter dated June 20, 1989, the Comptroller approved Chase Manhattan's proposal. In granting approval, the Comptroller relied upon two provisions of the Act: 12 U.S.C. § 24 (Seventh)[2] and 12 U.S.C.

[2] 12 U.S.C. § 24 (Seventh) provides, in pertinent part, that national banks may "exercise . . . all such incidental powers as shall be necessary to carry on the business of banking."

§ 371." The Comptroller specifically found that title insurance falls within the incidental powers of a national bank, noting that title insurance agency activities are both convenient and useful to the bank's express power to make real estate loans and that there has been judicial recognition that certain forms of insurance related to traditional lending activities of banks are within the incidental powers of a bank.

Plaintiffs challenge the validity of the Comptroller's ruling. They argue that the sale of title insurance is outside the scope of authority conferred on national banks by the NBA, and is contrary to judicial precedent. They contend that 12 U.S.C. § 92, which permits national banks doing business in towns with populations of less than 5,000 to "act as the agent for any fire, life, or other insurance company," prohibits national banks in larger towns from engaging in the business of title insurance. In essence, plaintiffs seek a declaratory judgment that the Comptroller acted outside of his scope of authority and contrary to the NBA when he granted approval to Chase Manhattan to operate subsidiaries engaged in the business of issuing title insurance.

Defendants ask that the Court uphold the Comptroller's ruling that title insurance activities are not prohibited by 12 U.S.C. § 92, are related to the traditional lending powers of banking, are incidental to the business of banking and therefore fall within the meaning of the incidental powers clause of the NBA. They argue that § 92 relates only to the sale of traditional insurance, which is substantially unlike title

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[3] 12 U.S.C. § 371 expressly authorizes national banks to "make, arrange, purchase or sell loans or extensions of credit secured by liens on interest in real estate."

insurance. Finally, defendants argue that the Comptroller's decision to authorize the sale of title insurance by national banks and their subsidiaries must be accorded great deference by this Court, as this Court is reviewing an agency's interpretation of its governing statute.

DISCUSSION

I. Decision of the Comptroller

In a letter dated June 20, 1989, Senior Deputy Comptroller J. Michael Shepard approved Chase Manhattan's application to operate a subsidiary engaged in the business of title insurance activities. Mr. Shepard relied on OCC Interpretive Letter #368, dated July 11, 1986 which concluded that national banks are authorized to act as agents for the sale of title insurance. In Letter #368, in analyzing the incidental powers clause, the Comptroller discussed two tests the courts have used when determining whether a given activity is incidental within the meaning of 12 U.S.C. § 24. Letter #368 at 77,838.

A. The Defendants' Arguments

First, under *Arnold Tours, Inc. v. Camp*, 472 F.2d 427 (1st Cir.1972), an activity has been defined as incidental to the business of banking if it is "convenient or useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act." *Id.* at 432. *See also, M & M Leasing Corp. v. Seattle First National Bank*, 563 F.2d 1377 (9th Cir.1972); *Guaranty Mortg. Co. v. Z.I.D. Associates*, 506 F.Supp. 101 (S.D.N.Y.1980). Second, the Comptroller has found that an activity is incidental to the business of

banking where the activity in question is similar to a permitted activity. *See e.g., Independent Bankers Assoc. v. Heimann*, 613 F.2d 1164 (D.C.Cir.1979) *cert. denied*, 449 U.S. 823, 101 S.Ct. 84, 66 L.Ed.2d 26 (1980). Although the OCC views the *Arnold Tours* test as too restrictive (and has maintained this position since the issuance of Letter #368: *See e.g., American Ins. Assoc. v. Clarke*, 865 F.2d 278 (D.C. Cir.1988); *Securities Industry Assoc. v. Clarke*, 885 F.2d 1034, 1048 (2d Cir.1989)) it found that under either the "convenient and useful" or the "similar to a permitted activity" test, title insurance activities are incidental to the business of banking.

The Comptroller found that title insurance meets the *Arnold Tours* test in that it is convenient and useful in connection with making real estate loans, an express power granted to national banks. 12 U.S.C. § 371. The Comptroller observed that banks often require title insurance coverage to protect against contingencies that would prevent the bank from being able to foreclose on the collateral. He noted that it would be both convenient and useful for borrowers to discuss and purchase title insurance coverage while negotiating a real estate loan. The Comptroller clearly views title insurance as a logical compliment [*sic*] to the review of abstracts of title, legal title opinion, and title insurance commitments already conducted by banks in connection with making real estate loans. Similarly, every loan made by a bank that is collateralized by a parcel of real estate is conditioned on an examination of the relevant land records. National banks who make real estate loans regard title policy as an essential part of their loan package, helping them to transfer these loans as they would other com-

mercial property. Powell on Real Property, ¶ 1028 at 92-3.

Furthermore, title insurance is a contract under which the insurer indemnifies the insured for a specific amount against any loss through then existing defects in title. Powell on Real Property, ¶ 1029 at 92-5-29-7. The lender's policy protects the lender's interest in that it insures a valid enforceable lien in the event of a default. In this sense, the Comptroller found that title insurance is similar to an extension of credit, a traditional bank function. Banks frequently prepare and review abstracts of title and legal title opinions concerning mortgaged real property. In this respect, the Comptroller concluded that title insurance, like credit life insurance, is a limited type of coverage similar to a traditional bank practice connected to an extension of credit and therefore, incidental to the business of banking.

A similar position was adopted by the D.C. Circuit in *Independent Bankers Assoc.*, 613 F.2d 1164. There the court observed that credit life insurance (which includes health, accident and life insurance issued as protection for a loan) is essential where ordinary loans on personal security are made, is a limited type of coverage that protects loans, and is connected to an extension of credit. For these reasons, the court held that credit life insurance is incidental within the meaning of 12 U.S.C. § 24 (Seventh) *Id.* at 1170.

B. The Plaintiffs' Arguments

Plaintiffs rely on *Saxon v. Georgia Ass'n of Independent Ins. Agents, Inc.*, 399 F.2d 1010 (5th Cir. 1968), in which there was a dispute over a national bank's authority to issue broad forms of insurance.

The *Saxon* court held that the Office of the Comptroller acted outside its scope of authority and contrary to § 92 when it granted national banks the very broad and unlimited power to "act as agent in the issuance of insurance which is incidental to banking transactions." [4] *Id.* at 1012. However, in Letter #368, the Comptroller distinguished title insurance from the types of traditional insurance at issue in *Saxon*. He noted that title insurance is unique and unlike the broad forms of insurance activities regulated by 12 U.S.C. § 92 and therefore not barred by the *Saxon* decision. Title insurance differs from other forms of insurance since it insures title as of the date of the policy against loss by reason of situations arising out of past conduct. Powell on Real Property, ¶ 1030, at 92-7. There are no risks insured based on actuarial computations of future probabilities, as in most forms of insurance. In this respect, title insurance is similar to municipal bond insurance, an insurance activity that has been held to be incidental to the business of banking and not prohibited by 12 U.S.C. § 92. *See, e.g., American Ins. Ass'n v. Clarke*, 656 F.Supp. 404, 410 (D.D.C.1987), *aff'd*, 865 F.2d 278 (D.C.Cir.1988) (municipal bond insurance distinguished from other types of insurance based on the absence of actuarial computations in determining risk).

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[4] Pursuant to the OCC ruling at issue in *Saxon*, national banks began to engage in the business of broad forms of automobile, home, casualty and life insurance. *Id.* at 1012. The 5th Circuit, in determining whether the Comptroller had acted within the statute, read § 92 as an express limitation of the incidental powers granted by 12 U.S.C. § 24 (Seventh) by expressly authorizing the relevant insurance sales only in towns with populations of less than 5,000, and held that the OCC ruling was contrary to § 92. *Id.* at 1016.

II. Scope of Review

The principles regarding judicial deference to agency interpretation of its governing statute are outlined in *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-45, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984). In reviewing an agency made rule, the first issue the court must decide is whether Congress has addressed the specific question at issue. If congressional intent is clear in the statute, the court must enforce that intent. If however, Congress has not addressed the specific question at issue, the court must determine whether the agency's ruling is based on a reasonable interpretation of that statute. In upholding an agency's decision "[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted, . . . or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 843 n. 11, 104 S.Ct. at 2782 n. 11. The agency interpretation is controlling unless it is "arbitrary, capricious or manifestly contrary to the statute." *Id.* at 844, 104 S.Ct. at 2782. These principles of judicial review of agency interpretation apply to the Comptroller's interpretation of the NBA. *American Insurance Assoc.*, 865 F.2d at 281; *Securities Industry Assoc.*, 885 F.2d at 1042. Thus, under the principles outlined in *Chevron* and its progeny, this Court must defer to the Comptroller's decision if it is rational and consistent with the statute.

Plaintiffs argue that the Comptroller's approval of the Chase Manhattan proposal violates the NBA and is not entitled to deference. In support, plaintiffs rely heavily on *Saxon*, 399 F.2d 1010, discussed *supra*.

Plaintiffs argue that title insurance falls within the scope of § 92 and, inasmuch as Chase Manhattan has not indicated that it intends to limit its title insurance activities to towns with populations of less than 5,000, the Comptroller's approval of the Chase Manhattan proposal is contrary to the statute. 12 U.S.C. § 92.[5]

However, the Comptroller is entitled to "look beyond a label given a certain activity to determine whether or not it is permissible." *American Ins. Assoc.*, 656 F.Supp. at 408. The Comptroller is not precluded from determining that title insurance falls outside of the scope of activities discussed in § 92 even though it is labeled "insurance." This point is illustrated by the fact that courts have held in the past that various types of "insurance" are incidental to the business of banking and not prohibited by § 92. *See e.g., American Ins. Assoc.*, 865 F.2d 278 (holding that Comptroller's determination that municipal bond insurance falls within the scope of the incidental powers clause is rational under the NBA) and *Independent Bankers Assoc.*, 613 F.2d at 1170 (holding that Comptroller's finding that the sale of credit life insurance falls within the incidental powers clause is rational under the NBA).

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[5] There is some dispute as to whether *Saxon* was correctly decided. *Independent Ins. Agents v. Board of Governors*, 736 F.2d 468, 477 n. 6 (8th Cir.1984). However, whether or not *Saxon* was correctly decided, it does not control the outcome of the case at bar. As discussed, *supra*, *Saxon* involved national banks' authority to sell broad forms of automobile, home, casualty and liability insurance, activities *specifically prohibited* by the NBA (12 U.S.C. § 92). *Saxon*, 399 F.2d at 1012. As far as the instant case, the NBA does not specifically prohibit national banks from issuing title insurance, and Congressional intent is therefore unclear.

III. The Conclusion of This Court

As noted above, 12 U.S.C. § 24 (Seventh) grants national banks the authority to exercise "all such incidental powers as shall be necessary to carry on the business of banking." This clause has been broadly construed to include activities which are "convenient or useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act." *M & M Leasing Corp.*, 563 F.2d at 1382.

Although the Comptroller argues that the *Arnold Tours* test, (used to determine whether a given activity is "incidental," discussed *supra*, at § I.A) is unnecessarily restrictive, he has found that even under the *Arnold Tours* test, title insurance is incidental to the business of banking within the meaning of 12 U.S.C. § 24 (Seventh). As we agree that title insurance agency activities satisfy the requirements of the *Arnold Tours* test, we decline to address the Comptroller's position that the test is too restrictive.

Title insurance is commonplace where loans collateralized by a parcel of real property are made and has, in effect, become an essential element of the real estate package. Therefore, it is a rational conclusion that the sale of title insurance in connection with real estate loans made by a national bank is incidental to the express power of a national bank to make real estate loans. Further, it is rational to conclude that title insurance, like credit life insurance, is an activity considered incidental to the business of banking in that it is a limited type of coverage that protects the lender in the event of a default.

We find that it is neither arbitrary nor capricious to view 12 U.S.C. § 92 as a supplemental powers pro-

vision, not a limitation on national banks' incidental powers under 12 U.S.C. § 24 (Seventh). Further, even if § 92 were viewed as a limitation, we find that the Comptroller's determination that title insurance is so significantly different from the broad forms of insurance addressed in § 92 as to remove title insurance from the scope of § 92 is rational under the NBA.

The question before this Court is not whether the NBA expressly authorizes national banks to engage in the business of title insurance agency activities. Rather, the question is whether the Comptroller's determination that a bank may engage in the business of title insurance agency activities is rational under the NBA. The Comptroller determined that the activities proposed by Chase Manhattan are incidental to banking business in that they are convenient and useful in connection with its express power to make real estate loans and that they are similar to an extension of credit, an activity already performed and permitted. As the Comptroller's determination was neither erroneous nor arbitrary or capricious, this Court will not disturb it. Therefore, defendants' motion to dismiss is granted and plaintiffs' motion for summary judgment is denied.

It Is So Ordered.

APPENDIX C

COMPTROLLER OF THE CURRENCY
ADMINISTRATOR OF NATIONAL BANKS

Washington, D.C. 20219

June 20, 1989

Mr. Thomas C. Lynch
Executive Vice President
Chase Manhattan Bank, N.A.
1 Chase Manhattan Plaza
New York, New York 10081

Dear Mr. Lynch:

This letter is in response to your notice of March 3, 1989, advising the Office of the Comptroller of the Currency ("OCC") that Chase Manhattan Bank, N.A. ("Bank"), intends to establish two *de novo* operating subsidiaries ("Subsidiaries") to sell title insurance as agent to owners and lenders in connection with residential and commercial real estate loans made by the Bank and its affiliates.

The Subsidiaries will be established pursuant to 12 C.F.R. § 5.34, and will be incorporated in Delaware. One subsidiary will be located at an office of a home mortgage affiliate of the Bank, the other will be located at an office of the Bank. Initially, the Bank will own 100 percent of the voting stock of the Subsidiaries, but may sell up to 20 percent of each subsidiary's stock to an unaffiliated third party. As required by 12 C.F.R. § 5.34(e), the Bank will at all times retain ownership of at least 80 percent of the voting stock of each subsidiary.

It is anticipated that the Subsidiaries will obtain certain services by entering into agreements with entities unaffiliated with the Bank. These services may include reviewing abstracts of title, obtaining updated abstract and title opinions, preparing preliminary title insurance commitments and final title insurance policies on behalf of insurers, and providing clerical assistance related to the Subsidiaries' title insurance agency activities.

It is also anticipated that the Subsidiaries will enter into agency agreements with one or more title insurance companies. Under these agreements, the Subsidiaries will retain a portion of the premiums paid on the title insurance policies they sell. You have stated that the Subsidiaries will comply with all federal and state laws and regulations applicable to their title insurance agency activities.

The Bank and its affiliates currently require customers to obtain title insurance as a condition to obtaining mortgage loans. This condition is imposed in order to protect the lender's security interest in the mortgaged property. Although the Bank and its affiliates will continue to require mortgagors to obtain title insurance, the Bank has assured the OCC that the following practices will be observed when offering title insurance through the Subsidiaries. Borrowers will be able to purchase title insurance from the insurer of their choice and will not be obligated to use the services of the Subsidiaries. Moreover, a lender's decision to grant or deny a mortgage will not be affected by whether a borrower has purchased title insurance sold by the Subsidiaries nor will a lender accord more favorable treatment to customers who elect to obtain title insurance through the Sub-

sidiaries. Customers will be advised of the services offered by the Subsidiaries and the relationship between the lender and the Subsidiaries.

Discussion

Title insurance is limited purpose insurance designed to protect the owner of an interest in real estate against the risk of loss resulting from title defects or encumbrances on the property. Its development in the late 19th century is related to the mortgage lending activities of banks and many title insurance companies were departments of banks and trust companies until the 1930s.

The OCC has issued an interpretive letter which concludes that national banks are authorized to act as agents for the sale of title insurance. *See* Letter No. 368,[1] *reprinted in* Fed. Banking L. Rep. (CCH) ¶ 85,538 (July 11, 1986). That conclusion was based on the determination that selling title insurance is incidental to national banks' explicit authority to make, arrange, buy and sell mortgage loans under 12 U.S.C. §§ 24(7) and 371. *Id.* The conclusion also is supported by judicial recognition that it is incidental to banking, and therefore permissible, for national banks to sell forms of limited purpose insurance related to the traditional lending activities of banks. *See Independent Bankers Association of America v. Heimann*, 613 F.2d 1164 (D.C. Cir.

[1] The conclusion reached in Letter No. 368 has been challenged as improper rulemaking in *American Land Title Ass'n v. Clarke*, No. A87-CA-408 (W.D. Tx. filed July 8, 1987). The court has not yet ruled on the OCC's motion to dismiss nor issued any orders on other than procedural matters.

1979), *cert. denied*, 449 U.S. 823 (1980) (credit life insurance).

Your proposal is consistent in all material respects with the proposal which was approved in Letter No. 368. Since 12 C.F.R. § 5.34 permits a national bank to engage in any permissible activity through an operating subsidiary absent supervisory or regulatory concerns, the Bank may proceed with its proposal to establish operating subsidiaries to sell title insurance as agent.

Sincerely,

/s/ J. Michael Shepherd
J. MICHAEL SHEPHERD
Senior Deputy Comptroller
for Corporate and Economic Programs

APPENDIX D

William B. Glidden, Assistant Director, Legal Advisory Services Division. Letter No. 368. July 11, 1986. Interpreting 12 USC 24(7) (¶ 49,101); 12 USC 371 (¶ 66,076).

This is in response to your request for an opinion as to whether your client, * * * ("Bank"), or its operating subsidiary may perform certain activities related to the sale of title insurance. From correspondence and conversation with you, it is our understanding that the Bank is seeking permission to engage in the following three activities: to act as agent in the sale of title insurance, to enter into a percentage lease and employee sharing arrangement with a title insurance agency, and to acquire a franchise from a title insurance agency to prepare and distribute commitments and policies for title insurance.

In order not to delay any further our response, you agreed, in a discussion with Nancy E. Chase, an attorney with this Office, to limiting your request at this time to the first activity listed, with the Office giving you general information regarding the permissibility of engaging in the remaining activities. This procedure would avoid your supplying the Office with specific information regarding the contractual arrangements contemplated under the second two proposals—information that the Office would need in analyzing the activities and that Ms. Chase understood was not currently available.

Background

Title insurance is a unique type of insurance. Its purpose is to reduce the risk of loss resulting from

title defects or encumbrances existing on property at the time the policy is issued. It does not protect the insured from events that happen after the contract is written.

Title insurance can protect, generally through separate policies, both the owners of the property and the mortgagee. Different policy forms are required because an owner and a lender are exposed to somewhat different title risks. The owner's policy protects the ownership interest or right of possession in the property. Thus, it is ordinarily issued in an amount equal to the purchase price. The lender's policy protects the lender's security interest in the land securing the repayment of principal and interest. It ensures that the lien has been validly created by the owner of the mortgaged land, that it is enforceable in the event of default, and that the lien has the position of priority of claim on the land as shown in the policy. Consequently, the lender's policy generally covers only the amount of the mortgage loan outstanding.

Title insurance is written on an individual basis and in group or franchise form for the convenience of large users of title insurance policies, *e.g.*, lending institutions. Group policies are simply facilitative arrangements under which a master policy is used to spell out the insurance clause and the various policy provisions. Each title or risk is then covered by a certificate, once the title insurer has had the opportunity to underwrite it. Group policies also are often used in connection with credit life insurance offered by a lender.

After application is made for title insurance, the first document the applicant and other interested persons receive is one which summarizes the underwriter's evaluation of title based on the search and ex-

amination of title. This document is commonly known as a title insurance commitment. Its function is to begin the sale or loan "closing" process.

In addition to summarizing the condition of title, the commitment provides a correct legal description of the land involved, identifies the specific form of policy or policies the insured is prepared to issue, the amount of insurance requested, the standard and special exceptions which will appear in the policy or policies (unless removed before closing) and, in most locations, a brief description of the legal instrument required to create the estate or interest to be insured. The closing agent (an attorney, an escrow company, or an escrow department of a title company or bank) is responsible for coordination among the parties, compliance with all closing instructions received from the parties, proper handling of all legal documents and funds involved in consummating the transactions, and, finally, obtaining a title insurance policy for each party to be insured which complies in form and content with the previously established requirements of the insured.

You stated in your letter that as part of their ordinary duties when making loans secured by real property, loan officers of the Bank frequently have prepared and reviewed for them, or themselves review, abstracts of title and legal title opinions concerning the real property to be mortgaged. You observed that these duties are substantially identical to the duties performed by a title insurance company or agency when it prepares a title insurance commitment and policy.

Because of the importance to a bank of protecting its security interest in its mortgaged property, it is not surprising that banks and trust companies were closely associated with the title insurance business

from its inception at the end of the nineteenth century until the Depression. *See generally* Smith, *Evolution of the Title Policy*, Title News (February 1976). In discussing the relationship between the growth of the title insurance industry and the demand by lending institutions for insurance to protect real estate mortgage loans, H.M. Johnson, in his article "The Nature of Title Insurance," notes that the lending and insurance functions both were offered originally by banks: "At one time title insurance companies were departments in banking institutions, and their operations were an integral part of the money lending apparatus." *See* Johnson, "The Nature of Title Insurance," 33 J. Risk Ins. 393, 393 (1966). Likewise, in a book on title insurance, this combination of banking and title insurance is again mentioned: "The majority of the early ventures into title insurance were made by banks and trust companies who combined the title insurance function with the lending of mortgage money." *See* Title Insurance Companies (Philo Smith publ.). *See also* Public Regulation of Title Insurance Companies and Abstracters 0.10-0.30 (Villanova Press, E.F. Roberts ed. 1961) ("Villanova Treatise").

The first title insurance policy was issued in Philadelphia in 1876 by The Real Estate Title Insurance and Trust Company. More title insurance companies were established soon thereafter—"practically all of which consisted of title insurance departments of banks and trust companies." Villanova Treatise at 14 n.2. It is said that "within the following fifty years practically every bank and trust company in Philadelphia had its affiliated title department which examined and insured or guaranteed the title in real

estate acquired with the bank's own funds or for the account of its trust estates or its customers." *Id.*

As a result of failure of banks and mortgage guarantee companies during the Depression, many title companies were divested and independent title companies involved only in the title insurance business were organized. Most states now restrict banks from engaging in title insurance, *see* Memorandum to Board of Governors of the Federal Reserve System from Federal Reserve Bank of Philadelphia (August 31, 1973) (Provident National Corp. application to retain ownership of a title insurance company); however, corporations may still be formed in a number of states, including Oklahoma, to engage in both title insurance and trust business.[1] *See* Okla. Stat. Ann. tit. 6, § 1001A(20) (West 1984). In addition, an operating subsidiary of a savings and loan association may act as an agent or broker for title insurance. *See* 12 C.F.R. § 545.74(c)(5)(ii).

Although title insurance companies now tend to be independent of banks, there remains a close relationship between certain banking functions and the title insurance business. For example, title insurance companies may perform functions similar to those of banks, such as dealing in mortgage loans, and, depending upon state law, acting as transfer agents and engaging in the trust business.

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[1] It is the position of the Office that since national banks are federal instrumentalities federal law controls what insurance activities are permissible. Therefore, although the reach of the McCarran Ferguson Act, 15 U.S.C. § 1011 *et seq.*, giving states the authority to regulate "the business of insurance" within their borders is somewhat uncertain, national banks would not be prohibited from selling title insurance even if the activity is impermissible for state banks.

Furthermore, as mentioned above, title insurance is often purchased in conjunction with the granting of a mortgage loan. In addition to performing a credit analysis, a bank must review the title insurance documents prior to granting a loan to be sure that its security interest in the property will be protected. In cases where banks conduct "closings" for customers, review by the bank of title insurance policies takes on added importance since the bank also must confirm that the policy complies with the borrower's previously established requirements.

Thus, it is important for banks to be familiar with title insurance procedures in connection with their mortgage lending activities. The experience gained in reviewing title insurance documents gives national banks the expertise necessary to perform related agency activities. Although banks may have developed expertise in the title insurance business, the authority of national banks to act as agents in the sale of title insurance must also be established.

Opinion

The National Bank Act provides that national banks shall have the power:

> To exercise . . . all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security. . . .

12 U.S.C. § 24(7). Since national banks are not expressly authorized to sell title insurance, in order for them to engage in that activity, the activity must be

incidental to the business of banking. Recently, the Court of Appeals for the First Circuit enumerated a test to be used in determining whether a given activity is incidental to the business of banking. In *Arnold Tours, Inc. v. Camp*, which invalidated an OCC interpretive ruling authorizing national banks to run travel agencies, the court stated that:

> a national bank's activity is authorized as an incidental power, "necessary to carry on the business of banking," within the meaning of 12 U.S.C. § 24, seventh, if it is convenient or useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act.

472 F.2d 427, 432 (1st Cir. 1972). Accordingly, under the *Arnold Tours* test, for an activity to be incidental to the business of banking, it must be connected to the performance by the bank of its express powers.

This Office views the *Arnold Tours* test as too restrictive. Other courts have used broader and more realistic standards, such as finding the activity in question similar to a permitted activity and not prohibited by statute, *Miller v. King*, 223 U.S. 505 (1912); *Wyman v. Wallace*, 201 U.S. 230 (1906); finding that banks have traditionally engaged in similar activities, *Colorado National Bank v. Bedford*, 310 U.S. 41 (1940); *IBAA v. Heimann*, 613 F.2d 1164 (D.C. Cir. 1979); finding that the activity is useful and convenient to the bank in the current competitive climate, *First National Bank v. Hartford*, 273 U.S. 548 (1927); *Colorado National Bank v. Bedford*, *supra*; *Franklin National Bank v. New York*, 347 U.S. 373 (1954); or finding that the proposed service is a convenience to its customers,

Clement National Bank v. Vermont, 231 U.S. 1290 (1913).

However, the *Arnold Tours* test has been cited with approval by courts in both the Second and Ninth Circuits. *See National Retailer Corp. v. Valley National Bank*, 590 F.2d 315 (9th Cir. 1979); *M&M Leasing v. Seattle First National Bank*, 563 F.2d 1377 (9th Cir. 1977); *Guaranty Mortgage Co. v. ZID Associates*, 506 F. Supp. 101 (S.D.N.Y. 1980).

By applying the several standards cited above, including the more restrictive *Arnolds Tours* [*sic*] test, it can be concluded that the sale of title insurance by national banks in an agency capacity is incidental to banking under 12 U.S.C. §§ 24(7) and 371.[2] As you may be aware, the Office has not in the past objected to national banks' offering title insurance as agents. However, the rationale for the Office's position has only been alluded to briefly in earlier opinion letters. Consequently, it is appropriate to set forth our reasoning in more detail at this time.

Since title insurance is a specialized form of insurance traditionally offered by banks, is related to extensions of credit by a bank, and its sale does not

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[2] It has been the longstanding position of the Office that a national bank which holds a group insurance policy is acting as a policyholder not as an agent for the insurer. Consequently, if a bank offers group insurance related to bank loans, the activity is permissible under 12 U.S.C. § 24(7) and does not raise the legal concerns addressed in *Saxon v. Georgia Association of Independent Insurance Agents*, 399 F.2d 1010 (5th Cir. 1968). Therefore, the Bank may offer its customers title insurance coverage under a group policy arrangement where the Bank holds the master policy without concern for any possible inconsistency with 12 U.S.C. § 92 and the *Saxon* ruling.

involve a bank acting as agent for broad forms of insurance products, the proposed activity is consistent with the principles enunciated in *IBAA v. Heimann*. Therefore, based on the opinion of the court in *IBAA v. Heimann* and for the reasons discussed above, it is my opinion that the Bank may act as agent in the sale of title insurance incidental to its express authority to make loans secured by real property. If the Bank intends to conduct the title insurance agency activities in an operating subsidiary, you should follow the notification procedures under 12 C.F.R. § 5.34 to inform the Office of such intent.

In regard to the remaining activities proposed in your request letter, I offer some suggestions which may be helpful in structuring the arrangements with an outside title insurance agency in such a way as to comply with the laws applicable to national banks. The Office would not object in principle to the Bank performing the proposed clerical services. Such services, as you have described them, including obtaining an updated abstract and title opinion, noting exceptions and fulfilling requirements, or having requirements fulfilled, as set out in the title opinion, and preparing a preliminary title insurance commitment and a final title insurance policy, appear to be incidental to the functions involved in preparing loan documentation prior to closing on a mortgage loan. Certain additional issues may be raised, however, when the clerical services are performed in conjunction with other arrangements.

Under your second proposal, the Bank would enter into a percentage lease and employee sharing arrangement with a title insurance agency. As you mentioned in your letter, the Office has approved arrangements

in which national banks lease excess office space to insurance agencies on a percentage lease basis. *See* Letter from Brian W. Smith, Chief Counsel (OCC Interpretive Letter No. 274, December 2, 1983), *reprinted in* [1983-1984 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,438. However, you should be aware that if the percentage required under the lease is unusually high an inference of partnership may arise. This concern is discussed in Letter No. 274.

Also, since you state that the Bank will be performing clerical services for the title insurance agency in office space leased to the agency by the Bank, a partnership or joint venture may be created if the persons performing the clerical services are considered to be dual employees of the Bank and the insurance agency. Although the Office has permitted national banks to engage in certain partnerships, such participation raises significant legal, policy, and prudential concerns. Thus, the Office would want to review the particular contractual arrangements prior to the Bank's beginning operations under the second proposal. I am enclosing an OCC opinion letter related to a percentage lease and employee sharing program to assist you in structuring your arrangement.

Your third proposal involves the Bank acquiring a franchise from a title insurance agency to prepare and distribute commitments and policies for title insurance. The Office has not taken a position on whether national banks are authorized to enter into franchise agreements. However, since the term "franchise" seems to be used to describe various business arrangements, there does not appear to be consistently

applied definition on which to base an opinion that would be applicable in all cases. As a result, as you indicated in your letter, the exact nature of the franchisor/franchisee relationship must be determined on a case-by-case basis. Thus, if the Bank decides to enter into a franchise arrangement, the Office would also want to review the terms of the contract to determine if the arrangement would be permissible.

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